Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

HARTFORD INSURANCE COMPANY OF THE MIDWEST, an Indiana corporation,

Petitioner,

vs.

CATT MICHELE HUTH, an individual,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the abstention doctrine be expanded, contrary to decisions of other Circuits as well as an earlier decision of the Ninth Circuit itself, to allow a party to circumvent federal court jurisdiction over a first-filed federal declaratory judgment action by filing a parallel state court declaratory judgment case and then using the factors set forth in *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942), to obtain both a stay of the federal case and a remand of the state case, even where the state case was otherwise fully removable under 28 U.S.C. § 1441?

2. Should the Court address the question it left unanswered in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), concerning the discretion a federal district court has to abstain from considering a federal declaratory judgment action when there is no parallel, concurrent state action?

PARTIES

The caption of this case contains the names of all parties. Petitioner Hartford Insurance Company of the Midwest is a wholly-owned subsidiary of Hartford Fire Insurance Co., which in turn is a wholly-owned subsidiary of Hartford Financial Services Group, Inc., a publicly-traded company.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered July 30, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1) that gives rise to this petition is published as *Huth v. Hartford Insurance Co. of the Midwest*, 298 F.3d 800 (9th Cir. 2002), and is reprinted at Appendix 1. The District Court's opinion staying the federal declaratory judgment action and simultaneously remanding the state court declaratory judgment action (App. 8) is not otherwise published. The Ninth Circuit's order denying rehearing and rehearing en banc (App. 15) is not otherwise published.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was entered on July 30, 2002. Petitioner filed a timely Petition for Rehearing and Rehearing En Banc on August 12, 2002, which was denied on September 25, 2002. App. 15. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provision of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides in part:

> (a) In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

The relevant provision of the Arizona Declaratory Judgment Act, A.R.S. § 12-1831, provides in part:

> Courts of record within their respective jurisdictions shall have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

28 U.S.C. § 1441(a) provides in relevant part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1447(c) provides in relevant part:

> (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

STATEMENT OF THE CASE

Petitioner Hartford filed a federal declaratory judgment action on October 31, 2000, in the United States District Court for the District of Arizona. App. 16. Hartford alleged that the federal district court had subject matter jurisdiction under 28 U.S.C. § 1332 because defendant Huth was a resident of Arizona, Hartford was an Indiana corporation with its principal place of business in Indiana, and the amount in controversy exceeded $75,000. App. 17. Hartford asked the district court to declare that Catt Huth was not entitled to underinsured motorist insurance coverage benefits under a Hartford liability policy issued to Gail Huth (Catt Huth's mother) and Mary Sommers because Catt Huth was not a resident of her mother's household. App. 18.

On October 31, 2000, the same day the federal declaratory judgment action was filed, Catt Huth's counsel accepted service of process. On November 8, 2000 (more than a week later), Huth filed her own declaratory judgment complaint in the Superior Court of Arizona for Maricopa County. App. 20. This state declaratory judgment was identical in all material respects to Hartford's

federal case, and presented the identical issue, asking for a declaration that Catt Huth was entitled to uninsured motorist insurance coverage benefits because she was a resident of her mother's household. App. 22.

Hartford removed Huth's state court action to the United States District Court for the District of Arizona within the 30-day time limitation of 28 U.S.C. § 1446(b). Removal of the Arizona declaratory judgment action was based on diversity jurisdiction. Although Huth did not request a specific amount of damages in her state declaratory judgment action, she has demanded the immediate payment of Hartford's first layer of coverage of $250,000 and is seeking additional coverage beyond that amount.

After Hartford's removal of the Arizona declaratory judgment action to federal district court, Huth filed a motion to remand. She did not contend that removal was improper because the removal procedures were defective. She instead argued that removal was improper solely because the action was an insurance coverage dispute involving only state law issues. Huth also filed a motion to either dismiss or stay the federal declaratory judgment action based on this same premise. Hartford opposed these motions because removal was based on diversity jurisdiction and because there was no pending state court action after that removal was effected.

By order entered April 5, 2001 (App. 8), the District Court granted Huth's motion to remand the Arizona declaratory judgment action and also stayed the federal declaratory judgment action pending resolution of the remanded action in state court. App. 14.

Hartford appealed from the order remanding the Arizona declaratory judgment action. In a published

decision issued on July 30, 2002, the Ninth Circuit affirmed the District Court's order. *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800 (9th Cir. 2002). App. 1.

On August 12, 2002, Appellant Hartford filed a Petition for Rehearing En Banc in the Ninth Circuit, which that court denied on September 25, 2002. App. 15.

REASONS FOR GRANTING THE PETITION

The Decision Below Expands The Abstention Doctrine To Allow A Remand Of An Action That Had Been Properly Removed To Federal Court Under Diversity Jurisdiction, And In So Doing Has Heightened An Existing Conflict Among The Circuits.

This petition concerns two identical cases – a federal declaratory judgment action filed by petitioner Hartford, and a reactive state declaratory judgment action filed one week later by Huth. Because Huth's Arizona state court action involved complete diversity of citizenship, and the amount in controversy was met, Hartford properly removed it to federal court. But the federal district court, in a maneuver sanctioned by the Ninth Circuit, first remanded the state court action on abstention grounds, and then abstained from considering Hartford's federal case on the basis that the claim was better resolved in the "pending" state action.

Once a case is removed, only limited circumstances will support a remand. Under 28 U.S.C. § 1447(c), only a lack of subject matter jurisdiction or a defect in removal procedures will typically suffice. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345 (1976) (noting that district court exceeded its authority "in remanding on

grounds not permitted by the controlling statute [28 U.S.C. § 1447(c)]"; *see also Jamison v. Wiley*, 14 F.3d 222, 239 (4th Cir. 1994) (holding that under 28 U.S.C. § 1447(c), remand of properly-removed case permitted only where defect in removal procedure or lack of federal subject matter jurisdiction present); *Buchner v. F.D.I.C.*, 981 F.2d 816, 819 (5th Cir. 1993). Therefore, "if jurisdiction exists and was properly invoked, the Court has no discretion to remand." *Burnette v. Godshall*, 828 F. Supp. 1439, 1444 (N.D. Cal. 1993); *see also Davis v. Joyner*, 240 F. Supp. 689, 690 (E.D.N.C. 1964) (observing that "where Congress has provided both a state and a federal forum, and has further provided for actions first brought in the state court to be removed to the federal court, no discretionary power exists to remand the case to state court") (quoting *Vann v. Jackson*, 165 F. Supp. 377 (E.D.N.C. 1959)).[1]

Neither lack of subject matter jurisdiction nor a defect in removal procedures was present here. There was complete diversity of citizenship, and Huth never challenged the removal procedure. Her sole argument was instead that the federal court should abstain because the issue was better left to the state courts to resolve.

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[1] This Court recognized in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), that a remand for discretionary reasons not set forth in 28 U.S.C. § 1447(c) may at times be proper, although it expressly noted that the District Court in *Thermtron* should *not* have remanded because it "had no authority to decline to hear the removed case. The Court had diversity jurisdiction over the case, which is not discretionary." 484 U.S. at 356. The Court has not addressed the issue, also raised by the present case, of whether abstention is one of the limited discretionary grounds for remand permitted by *Cohill*.

This Court noted in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), that abstention from the exercise of federal jurisdiction should be the exception, not the rule, and termed it "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Id.* at 813 (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959)). The Court also noted the "virtually unflagging duty" to exercise federal jurisdiction when it exists. *Id.* Although the Court in *Colorado River* ultimately allowed abstention, it did so only because of "exceptional circumstances," one of which was that *a pending state court action* offered a more appropriate forum for resolution of the dispute. *Id.* at 819 (listing factors weighing against *concurrent* federal proceedings). In the present case, in contrast, there was no parallel state proceeding, only the properly-removed Arizona action that was before the District Court. The Ninth Circuit nevertheless held that, even though the later-filed Arizona declaratory judgment action had been properly removed to federal court, and even though diversity jurisdiction was present, the District Court was nevertheless free to treat it as a "pending" state action by first remanding it, and then abstaining in favor of it.[2]

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[2] In this respect, the Ninth Circuit appears to be encouraging an extreme form of forum shopping. Here, respondent Huth filed a state court action identical in every material respect to Hartford's first-filed suit. And even though that state court suit was fully removable under 28 U.S.C. § 1441, the net result here is that the properly-removed action has been remanded, and Hartford's first-filed action has been stayed under the abstention doctrine.

The Ninth Circuit's decision below significantly expands the abstention doctrine in a manner contrary to decisions of at least two other Circuits, an earlier decision from the Ninth Circuit itself, as well as decisions of this Court. If it is allowed to stand, it could enable parties to avoid federal jurisdiction in virtually any declaratory judgment case merely by filing a parallel state court case – *even a fully-removable one* – and then arguing that the federal court should remand the state case on abstention grounds before also abstaining in the federal one.

The decision below conflicts directly with an earlier Ninth Circuit decision, which held that a state action that has been properly removed to federal court is not a pending state action for purposes of abstention. In *Kirkbride v. Continental Casualty Co.*, 933 F.2d 729 (9th Cir. 1991), the state case had been removed in its entirety to federal court. After the federal district court remanded the declaratory judgment action to state court based on the abstention doctrine, the Ninth Circuit reversed. The court observed that "[t]he [abstention] doctrine is 'available only in situations involving the *contemporaneous* exercise of concurrent jurisdictions, either by the federal courts or by the state and federal courts.'" *Id.* at 734 (emphasis original). The court held that the abstention doctrine was not applicable because the entire case had been removed to federal court and thus "there was no concurrent or pending state court proceeding when" the motion for remand was filed. *Id.*

Other courts agree, including both the Second and Fourth Circuits. *See Dittmer v. County of Suffolk*, 146 F.3d 113, 117-18 (2d Cir. 1998) (recognizing that abstention could only be applied where there was the contemporaneous exercise of concurrent jurisdiction, which would not

include situation where case had been removed to federal court); *Myles Lumber Co. v. CNA Fin. Corp.*, 233 F.3d 821, 824-25 (4th Cir. 2000) (applying the abstention doctrine to a state declaratory judgment action that had been properly removed to federal court and holding that because the state action had been removed, there was no pending state court action and this factor, along with others, dictated against abstention). *See also Piekarski v. Home Owners Savings Bank*, 743 F. Supp. 38, 42 (D.D.C. 1990) (finding abstention doctrine was inapplicable because there was only "*one* case, which originally was in state court, but now has been properly removed to federal court") (emphasis original); *International Bhd. of Elec. Workers Local 1357 v. American Int'l Adjustment Co., Inc.*, 955 F. Supp. 1218, 1219 n.1 (D. Haw. 1997), *aff'd*, 142 F.3d 443 (9th Cir. 1998) (observing that there was no pending state action where state action had been properly removed); *Allstate Ins. Co. v. Longwell*, 735 F. Supp. 1187, 1191-92 (S.D.N.Y. 1990) (addressing facts almost identical to the present case, and noting that "doctrines of abstention . . . are predicated on the existence of pending state litigation on parallel issues, and, thus, are inapposite since there is no longer anything pending in the state courts – both lawsuits are now here.").

These cases suggest that the Ninth Circuit's holding below also conflicts with earlier decisions of this Court. Simply stated, a state action that has been removed is no longer a pending state case. Only by stretching the abstention doctrine beyond recognition can abstention be used to justify a remand of a properly-removed case. The effect of the Ninth Circuit's decision below is that jurisdiction in removed cases based on diversity becomes discretionary – even though a case is properly removed to federal court, it

nevertheless can be remanded on abstention grounds, and then serve as a "pending" state action to support abstention in an otherwise proper federal action. But this Court has already squarely rejected the notion that diversity jurisdiction can be so easily ignored. *See Cohill*, 484 U.S. at 356 (stating that diversity jurisdiction is "not discretionary," thereby precluding remand); *see also Williams v. Green Bay & W.R. Co.*, 326 U.S. 549, 553-54 (1946) (holding that "'[t]he diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts'").

Admittedly, a federal court has more discretion to abstain when the action before it is based on the Federal Declaratory Judgment Act. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-19 (1996). But this Court has never sanctioned abstention when no parallel state court action exists. In fact, in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), the Court left open the exact issue now raised, stating "[w]e do not attempt at this time to delineate the outer boundaries of that discretion [to abstain in declaratory judgment actions] in other cases, for example, cases raising issues of federal law *or cases in which there are no parallel state proceedings*." *Wilton*, 515 U.S. at 290 (emphasis added). The Court's earlier decision in *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942), the decision on which the Ninth Circuit relied below, had also discussed the extent of a federal district

court's discretion to abstain in declaratory judgment actions in favor of a pending state court action.[3]

It is one thing to abstain from hearing a federal declaratory judgment action when an existing, non-removable state court action is pending in which the issue can be fully resolved, especially if the issue is solely one of state law. It is quite another, however, to abstain where, as here, there is no pending state court action at all. The issue of a court's discretion to abstain in the latter circumstance was expressly left open by the Court in *Wilton*, and the Court should address it now.[4]

As noted, a number of jurisdictions, as well as the Ninth Circuit itself in an earlier opinion, have agreed that there is no pending state proceeding once a state case has been properly removed to federal court. *See Kirkbride,* 933 F.2d at 734; *Dittmer*, 146 F.3d at 117-18; *International Bhd. of Electrical Workers Local 1357*, 955 F. Supp. at 1219 n.1; *Piekarski v. Home Owners Savings Bank*, 743 F. Supp. at 42; *Longwell*, 735 F. Supp. at 1192. These same courts, as well as others, have further recognized that

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[3] *Brillhart* abstention also applies only to the *Federal* Declaratory Judgment Act, and should have no application to the removed state court action here, which was based on the Arizona Declaratory Judgment Act, where jurisdiction is mandatory rather than discretionary. *See* A.R.S. § 12-1831; *see also Kirkbride*, 933 F.2d at 734-35 (specifically rejecting the argument that a district court's abstention was supported by the "broader discretion afforded to trial courts to decline to exercise jurisdiction under the [Federal] Declaratory Judgment Act," because the case before it was a *state* declaratory judgment action removed to federal court).

[4] The present case, of course, goes still further in using the abstention doctrine in an effort to improperly *create* a pending state court action in the first place.

Brillhart abstention is simply unavailable where there is no parallel state proceeding. *See Kirkbride*, 933 F.2d at 734-35 (rejecting abstention because federal declaratory judgment action not filed during pendency of state action); *Dittmer*, 146 F.3d at 117-18 (*Colorado River* abstention unavailable without parallel, concurrent state court action); *Jefferson Ins. Co. of New York v. Lopez*, 2000 WL 33179290 (E.D. Cal. 2000) (holding that where there are no parallel state proceedings, the *Brillhart* abstention doctrine does not apply) (citing *Maryland Cas. Co. v. Knight*, 96 F.3d 1284 (9th Cir. 1996)); *Jaffee v. Society of New York Hosp.*, 1997 WL 685347 (S.D.N.Y. 1997) (refusing to apply the *Brillhart* abstention doctrine where there are no parallel state proceedings); *Michigan Tech Fund v. Century Nat'l Bank of Broward*, 680 F.2d 736, 742-43 (11th Cir. 1982) (holding that the district court abused its discretion in dismissing a federal declaratory judgment action based on diversity jurisdiction where there was no parallel case pending in the state court); *Federal Reserve Bank of Atlanta v. Thomas*, 220 F.3d 1235, 1247 (11th Cir. 2000) (stating that "[i]t is an abuse of discretion, however, to dismiss a declaratory judgment action in favor of a state court proceeding that does not exist"); *Exxon Corp. v. St. Paul Fire & Marine Ins. Co.*, 129 F.3d 781, 785 (5th Cir. 1997) (holding that the district court's determination not to stay the proceedings in federal court was well within its discretion based on the fact that there were no parallel state court proceedings). These cases are consistent with the Court's observation that under *Brillhart* "district courts have substantial latitude in deciding whether to stay or to dismiss a declaratory judgment suit *in light of* pending state proceedings." *Wilton*, 515 U.S. at 286 (emphasis added).

Still other courts have agreed with the Ninth Circuit's analysis below, and have suggested that federal courts have ample discretion to abstain even in the absence of a parallel state action. *See, e.g., Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co.,* 139 F.3d 419, 423 (4th Cir. 1998) (holding that no parallel state action necessary to support abstention in federal declaratory judgment action); *Golden Eagle Ins. Co. v. Travelers Cos.*, 103 F.3d 750, 754 (9th Cir. 1996) (citing *Wilton* and stating that "nothing in the Declaratory Judgment Act requires a parallel state proceeding" to justify abstention), *overruled in part on other grounds by Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220 (9th Cir. 1998); *Allstate Ins. Co. v. Seelye*, 198 F. Supp. 2d 629, 632 (W.D. Pa. 2002) (holding that absence of parallel state court proceeding is not determinative in deciding whether to abstain from hearing federal declaratory judgment action); *Board of County Comm'rs of the County of Marchall v. Continental Western Ins. Co.,* 184 F. Supp. 2d 1117 (D. Kan. 2001) (acknowledging question left open in *Wilton*, and applying the discretionary *Brillhart* standard to determine whether abstention proper where no parallel state action existed). The varying standards used in these cases only underscore the need to delineate the proper standard of discretion for abstention decisions when there are no parallel state proceedings.

This case squarely presents the issue of what, if any, discretion a federal court has to abstain in a declaratory judgment action when there is no pending state court case. It is an issue, left open in *Wilton*, that has produced considerable confusion in the lower courts. Where no parallel state case exists, to what extent does a federal court have jurisdiction to abstain? Should a court reviewing an abstention decision apply the discretionary standard of *Brillhart,* or

the "exceptional circumstances" test of *Colorado River*, when there is no pending state case?

The decision below expands the abstention doctrine to thwart otherwise proper federal jurisdiction. It also purports to answer the question left open by the Court in *Wilton,* and in so doing, it conflicts with decisions from at least two other Circuits, an earlier Ninth Circuit decision, as well as decisions of this Court. The Court should grant certiorari to clarify the law on this important aspect of federal jurisdiction.

CONCLUSION

The Petition for Writ of Certiorari should be granted. Alternatively, the Court should grant certiorari and summarily reverse.

Respectfully submitted,

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATT MICHELE HUTH, an individual, *Plaintiff-Appellee,* v. THE HARTFORD INSURANCE COMPANY OF THE MIDWEST, an Indiana corporation, *Defendant-Appellant.*	No. 01-16294 D.C. No. CV-00-02345-MHM OPINION

Appeal from the United States District Court
for the District of Arizona
Mary H. Murguia, District Judge, Presiding

Argued and Submitted
June 13, 2002 – San Francisco, California

Filed July 30, 2002

Before Donald P. Lay,[1] David R. Thompson and
Richard C. Tallman, Circuit Judges.

Opinion by Judge Lay

COUNSEL

Steven Plitt and Daniel Maldonado, Sanders & Parks Phoenix, Arizona, for the defendant-appellant.

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[1] The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

G. David Gage, Gage & Mathers, Phoenix, Arizona, for the plaintiff-appellee.

OPINION

LAY, Circuit Judge:

On October 31, 2000, Hartford Insurance Company filed a federal declaratory judgment action seeking a declaration that Catt Michele Huth is not entitled to underinsured motorist benefits under her mother's policy because she was not a resident of her mother's household at the time of her automobile accident. On November 8, 2000, Huth filed a similar declaratory judgment action in Arizona state court claiming she is entitled to benefits. Hartford removed the state action to federal district court on the basis of diversity jurisdiction. 28 U.S.C. § 1332 (2002). The two cases were then consolidated.

Huth filed a motion to remand the removed state court action and to stay Hartford's federal action. She urged the district court to decline jurisdiction under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2002). The district court granted Huth's motion. Hartford timely appealed.

Analysis

Appellate Jurisdiction

As a general rule, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . . " 28 U.S.C. § 1447(d) (2002). Huth, however, does not challenge subject matter jurisdiction or the validity of the removal procedures. Appellate

review of the remand order, therefore, is appropriate. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) ("'[Section] 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d). . . . '") (citation omitted). The district court's order is effectively a "final order;" it places Hartford "out of [federal] court" and has the effect of "surrender[ing] jurisdiction of a federal suit to a state court." *Snodgrass v. Provident Life & Accident Ins. Co.*, 147 F.3d 1163, 1166 (9th Cir. 1998). We hold we have jurisdiction under 28 U.S.C. § 1291. *See Quackenbush*, 517 U.S. at 711-12.

Section 2201 Jurisdiction

The exercise of jurisdiction under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a), is committed to the sound discretion of the federal district courts. *See, e.g., Wilton v. Seven Falls Co.*, 515 U.S. 277, 282-83 (1995); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494-95 (1942); *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998) (en banc). Even if the district court has subject matter jurisdiction, it is not required to exercise its authority to hear the case. *See Dizol*, 133 F.3d at 1223.

A. No Pending State Action

Hartford argues the absence of a pending state action precludes a district court from declining discretionary jurisdiction. It urges that a district court declining jurisdiction in the absence of a pending state proceeding ignores the purpose of granting district courts discretion. *Cf. Town of Lockport, N.Y. v. Citizens for Cmty. Action at*

the Local Level, Inc., 430 U.S. 259, 264 n.8 (1977) ("[P]rinciples of comity . . . do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court."). However, as we discuss, there are other balancing factors the district court must weigh. This inquiry is for the district court in the first instance. *See Wilton*, 515 U.S. at 289 ("We believe it is more consistent with the statute to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp."). It falls to the appellate courts only to determine whether a district court abused its discretion under the circumstances of the given case. *Id.*

Hartford also notes that we have stated that "there is no presumption in favor of abstention in declaratory actions generally, nor in insurance coverage cases specifically." *Dizol*, 133 F.3d at 1225. From this statement, Hartford argues the district court *must* retain jurisdiction when there is no pending state action.

As the district court noted, however, the *Dizol* court explicitly limited its holding. It held only that a district court need not decide sua sponte whether jurisdiction under § 2201(a) should be declined, and that the appellate court need not decide sua sponte whether the district court abused its discretion in exercising discretionary jurisdiction. *Id.* at 1227. Moreover, the *Dizol* court qualified its language by noting that "when other [non-discretionary] claims are joined with an action for declaratory relief . . . , the district court should not, as a general rule, remand or decline to entertain the claim for declaratory relief . . . [in order] to avoid piecemeal litigation." *Id.* at 1225. The court

observed the general rule of discretion: "But these are considerations for the district court, which is in the best position to assess how judicial economy, comity and federalism are affected in a given case." *Id.* at 1226.

Equally important is the fact that Hartford's favored language does not support its proposition. The fact that there is no presumption in favor of declining jurisdiction does not prove there is a presumption in favor of retaining jurisdiction. The simpler reading is that the language merely affirms the well-accepted rule that the decision whether to exercise jurisdiction over a declaratory action lies in the sound discretion of the district court.

B. Abuse of Discretion

Brillhart sets forth the primary factors for consideration. A district court should avoid needless determination of state law issues; it should discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation. *Dizol,* 133 F.3d at 1225. These factors, however, are not necessarily exhaustive. *See Am. States Ins. Co. v. Kearns,* 15 F.3d 142, 145 (9th Cir. 1994) (Garth, J., concurring).

The district court's discretion is not unfettered. "[A] District Court cannot decline to entertain such an action as a matter of whim or personal disinclination." *Dizol,* 133 F.3d at 1223 (quoting *Public Affairs Assocs. v. Rickover,* 369 U.S. 111, 112 (1962)). Likewise, "if a party properly raises the issue in the district court, the district court must make a sufficient record of its reasoning to enable appropriate appellate review." *Id.* at 1225. In its Order, the district court stated its reasoning under each *Brillhart* factor in satisfaction of the requirement that the court

make a record of its reasoning sufficient to allow review. The only question is whether the district court's rationale satisfies *Brillhart*.

The district court held that "avoiding duplicative litigation" favored neither party; we agree. The case will be disposed of entirely either in state or federal court, depending upon the outcome of this appeal. Absent a presumption either in favor of or against the district court's exercise of discretionary jurisdiction, the district court did not abuse its discretion by determining this factor was a wash.

The district court also found that "avoiding forum shopping" favored neither party, noting Huth merely preferred state resolution while Hartford preferred federal resolution. Again, we agree. Admittedly, Hartford filed first, and in *Dizol* we noted, "federal courts should generally decline to entertain reactive declaratory actions." *Id.* Yet, there is no question that both parties seek declaratory relief, and the fact that Hartford won the race to the courthouse by several days does not place it in a preferred position. In *Wilton,* the Court suggested that the order of filing is legally insignificant when it ruled in favor of a state action filed several weeks after a federal action. *Wilton,* 515 U.S. at 279-80, 290. In light of these considerations, we cannot hold the district court abused its discretion in its analysis of this factor.

Finally, the district court noted that both the federal and state actions involve the same purely state law issue. It held that state court would be the preferable forum. Hartford argues the district court erred because no "exceptional circumstances" justify abstention. "Exceptional

circumstances," however, is not the standard for discretionary jurisdiction under 28 U.S.C. § 2201. *Wilton,* 515 U.S. at 286-88 (distinguishing *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 810-20 (1976)). Admittedly, there is no great need for state court resolution of an open question of state law in this case. Yet, without a presumption in favor of retaining jurisdiction, we cannot find that the district court abused its discretion by declining jurisdiction.

Judgment AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

HARTFORD INSURANCE COMPANY OF THE MIDWEST, Plaintiff, vs. CATT MICHELE HUTH, Defendant.	No. CIV 00-2067-PHX-MHM No. CIV 00-2345-PHX-MHM **ORDER** (Filed Apr. 05, 2001)
CATT MICHELE HUTH, Plaintiff, vs. HARTFORD INSURANCE COMPANY OF THE MIDWEST, Defendant.	

On October 31, 2000, Hartford Insurance Company of the Midwest ("Hartford") filed a federal declaratory judgment suit (the "Hartford action") against Catt Michele Huth ("Huth"). On November 8, 2000, Huth filed a parallel declaratory action against Hartford in state court (the "Huth action"); Hartford removed. The cases have been consolidated by agreement before this court.

Huth now moves to dismiss, stay, or remand the Hartford action and to remand the Huth action. The court heard oral argument on March 27, 2001. Having carefully considered the parties' argument, the court now grants Huth's motions.

I. Background

In November 1999, Hutch sustained injuries in an automobile accident. She submitted a claim for underinsured motorist benefits under her mother's insurance policy with Hartford. The sole question raised in both declaratory judgment actions is whether Huth was a resident of her mother's household such that she would be a qualified insured under her mother's policy. The parties agree that Arizona law will answer this question.

II. Discussion

The Hartford action rests upon diversity jurisdiction and the Federal Declaratory Judgment Act ("FDJA"). Removal of the Huth action was predicated upon diversity. Huth emphasizes that jurisdiction under the FDJA is discretionary and that Ninth Circuit policy favors state court resolution of declaratory judgment actions regarding insurance coverage disputes. She therefore advocates remand of the Huth action and dismissal or staying of the Hartford action. Hartford counters that diversity alone justifies federal resolution and, further, that there is not a Ninth Circuit presumption in favor of abstention in insurance coverage cases.

Under the FDJA, federal courts *may* declare an interested party's legal rights. *See* 28 U.S.C. § 2201(a). A court has discretion to decline jurisdiction. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) ("By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants."). In determining whether to decline or maintain jurisdiction, the court should consider its

ability (1) to avoid needless determination of state law issues, (2) to discourage litigants from filing declaratory actions as a means of forum shopping, and (3) to avoid duplicative litigation. *See Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir. 1991) (citing *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942)).[1]

Huth cites several Ninth Circuit cases for the proposition that federal courts should decline jurisdiction over insurance coverage disputes that raise only state law issues: *Budget Rent-A-Car v. DeCoite*, 113 F.3d 1132, 1134 (9th Cir. 1997); *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796, 799 (9th Cir. 1995); *American Nat'l Fire Ins. Co. v. Hungerford*, 53 F.3d 1012, 1019 (9th Cir. 1995). Hartford argues these cases have "been effectively overruled" and rests on contrasting language in *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (*en banc*), whether the court wrote:

> . . . there is no presumption in favor of abstention in declaratory actions generally, nor in insurance coverage cases specifically. "We know of no authority for the proposition that an insurer is barred from invoking diversity jurisdiction to

[1] The Ninth Circuit has suggested numerous other potential considerations. For example, "whether the declaratory action will settle all aspects of the controversy; whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a 'res judicata' advantage; or whether the use of a declaratory action will result in entanglement between the federal and state court systems. In addition, the district court might also consider the convenience of the parties, and the availability and relative convenience of other remedies." *American States Ins. Co. v. Kearns*, 15 F.3d 142, 145 (9th Cir. 1994) (J. Garth, concurring).

> bring a declaratory judgment action against an insured on an issue of coverage."

Id. (quoting *Aetna Cas. & Sur. Co. v. Merritt*, 974 F.2d 1196, 1199 (9th Cir. 1992)).

Hartford argues that *Dizol* overrules *DeCoite*, *Karussos*, and *Hungerford* in their entirety. This Court disagrees. *Dizol* focused on whether courts must *sua sponte* discuss retention or refusal of jurisdiction under the FDJA. *Id.* at 1222-25. In an *en banc* decision, the court found no such obligation. *Id.* at 1224-25. The court went on to state that when a party properly questions jurisdiction, courts should discuss the issue in accordance with the *Brillhart* factors.[2] *Id.* at 1225-27. In conclusion, the court only overruled those portions of *DeCoite*, *Karussos*, *Hungerford*, and other cases, which made "suggestions to the contrary." *Id.* at 1227.

This Court, however, must still address the *Dizol* language that appears to deny the existence of any presumption in favor of abstention in insurance coverage cases. The statements arise during the *Dizol* Court's discussion of the *Brillhart* factors. The *Dizol* Court clarified that "there is no presumption in favor of abstention in declaratory actions generally, nor insurance coverage cases specifically." *Id.* at 1225. In fact, the *Dizol* Court noted that courts ordinarily should not decline jurisdiction where an independent basis for federal diversity jurisdiction exists, such as bad faith, breach of contract or fiduciary duty, recission, or claims for monetary relief. *Dizol*, 133 F.3d at 1225. It concluded that the district court

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[2] *See, supra*, footnote 1 and accompanying test.

should evaluate these considerations in a *Brillhart* analysis. While the *Dizol* Court clarified that there is no presumption in favor of abstention in insurance coverage cases, it reiterated that "[t]he Brillhart factors remain the philosophic touchstone for the district court" and that district courts are "in the best position to assess how judicial economy, comity and federalism are affected in a given case." *Id.* at 1225, 1226.

While there may not be a presumption of abstention in insurance coverage declaratory action, this Court finds abstention is still appropriate under the *Brillhart* analysis.

A. State Law Issues

The parties agree that state law will answer the sole question raised in both declaratory judgment actions. The only dispute in both actions is Ms. Huth's residence at the time of collision. This is a fact intensive question governed by Arizona law. Furthermore, there are no additional claims attached to either declaratory judgment action that would require this matter to proceed in federal court. Each action raises one issue (the same issue), resting exclusively on state law.

B. Forum Shopping

This factor weighs in neither party's favor. Hartford desires federal resolution, Huth seeks state resolution. Both seek the forum perceived as more advantageous.[3]

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[3] Hartford asks the court to place great weight on the fact that Huth filed her state court action after notice of Hartford's federal suit.

(Continued on following page)

C. Duplicative Litigation

This factor also weighs in neither party's favor. If this Court remands the Huth action, the relevant issue could be decided in state court and a federal action would be unnecessary. Similarly, if this Court declines to remand, all issues would be consolidated in federal court.

III. Conclusion

It is within this Court's discretion to decline jurisdiction of actions arising under the FDJA. The parties agree that both declaratory judgment actions rest exclusively on state law and that no other claims are joined with the actions. Both cases are in the early stages of the judicial process and declining jurisdiction at this point will not result in a waste of time or resources for the parties or the courts. The state court action[4] involves the same parties as the federal action, and the state court can resolve all the issues raised in the federal action. As the only dispute in the case is a question of Arizona law and because there is no additional basis for federal jurisdiction, this Court finds that state court is the more appropriate forum. Accordingly,

---

The court notes that timing is legally insignificant given *Wilton*, in which the court upheld staying a federal action in favor of the state action which was filed one month later. 515 U.S. at 280.

[4] Hartford argues there is no state court action as it has been removed to federal court. The Court does not find this argument persuasive. Clearly CIV-00-2345 began in state court. Once this court decides to remand the action the case will proceed in state court rather than federal court. Hartford can not avoid the Court's jurisdictional discretion under the FDJA by removing a state court action and then arguing no state court action exists.

IT IS ORDERED denying Huth's motion to dismiss (doc. 6 in 00-2607), but granting Huth's motion to stay (doc. 6 in 00-2067); and

IT IS FURTHER ORDERED granting Huth's motion to remand (doc. 2 in 00-2345).

IT IS FINALLY ORDERED directing the Clerk of the Court to remand case 00-2345 to the Superior Court of Maricopa County.

DATED this 3rd day of April, 2001.

/s/ Mary H. Murguia
Mary H. Murguia
United States District Judge

I hereby attest and certify on 4-5-01 that the foregoing document is a full, true and correct copy of the original on file in my office and in my custody.

CLERK U. S. DISTRICT COURT
DISTRICT OF ARIZONA

By /s/ [Illegible] Deputy

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATT MICHELE HUTH, an individual, Plaintiff-Appellee, v. HARTFORD INSURANCE COMPANY OF THE MIDWEST, an Indiana corporation, Defendant-Appellant.	No. 01-16294 D.C. No. CV-00-02345-MHM **ORDER** (Filed Sep. 25, 2002)

Before: LAY*, THOMPSON and TALLMAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Hartford Insurance Company of the Midwest, a Indiana corporation, Plaintiff, vs. Catt Michele Huth, an individual, Defendant.	No. CV '00 2067 PHX MS **COMPLAINT FOR DECLARATORY JUDGMENT RELIEF AND DEMAND FOR JURY TRIAL** (Filed Oct. 31, 2000)

Plaintiff Hartford Insurance Company of the Midwest ("Hartford") alleges as follows:

I.

This action is brought pursuant to 28 U.S.C. §2201 *et seq.*, the Federal Declaratory Judgment Act, and demand for jury trial is hereby made.

II.

Plaintiff Hartford is a Indiana corporation with its principal place of business in the state of Indiana.

III.

Defendant Catt Michelle Huth, upon information and belief, is a resident of the County of Coconino, State of Arizona.

IV.

This Court has jurisdiction over the parties and subject matter of this litigation pursuant to 28 U.S.C. §1332, because there is diversity of citizenship and more than $75,000 in controversy.

V.

Hartford issued an insurance policy for Mary Sommers and Gail Huth bearing policy number 55 PAE461320. The Hartford policy provided insurance coverage subject to applicable conditions and limitations.

VI.

On or about November 27, 1999 Defendant Catt Michele Huth was involved in a motor vehicle accident at the intersection of 83rd Avenue and Olive Avenue, in the city of Peoria, Maricopa County, State of Arizona. As a result of the motor vehicle accident, Defendant Huth sustained bodily injury for which she has made a claim upon Hartford for underinsured motorist coverage benefits under the Hartford policy (Policy No. 55 PAE461320) issued to Gail Huth. Defendant Huth has alleged that she is a resident of her mother's household and, therefore, is a qualified insured for underinsured motorist coverage under the Hartford policy (Policy No. 55 PAE461320).

VII.

Defendant Huth was not a resident of Gail Huth's household at the time of the accident and, therefore, does not qualify for underinsured motorist coverage benefits under Hartford's policy (Policy No. 55 PAE461320).

VIII.

Hartford is entitled to a judgment against Defendant Huth declaring that there is no coverage under the Hartford policy for the automobile accident which occurred on November 27, 1999 and the resulting injuries.

IX.

A justiciable controversy exists as to whether or not Hartford's policy provides underinsured motorist coverage benefits for Defendant Huth and Hartford does hereby request this Court to exercise its jurisdiction under 28 U.S.C. §2201 *et. seq.*, the Federal Declaratory Judgments Act, to adjudicate and declare Hartford's obligations under the Hartford policy.

X.

This action arises out of contract, entitling Hartford to an award of reasonable attorney's fees pursuant to A.R.S. § 12-341.01.

XI.

Hartford does hereby demand that this matter be resolved by jury trial.

WHEREFORE, Plaintiff Hartford Insurance Company of the Midwest prays for judgment against Defendant Catt Michelle Huth adjudicating and declaring:

(1) That there is no coverage under Hartford's policy issued to Gail Huth (Policy No. 55 PAE461320);

(2) For attorney's fees incurred herein pursuant to A.R.S. § 12-341.01;

(3) For an award of costs incurred herein; and

(4) For such other and further relief as this Court deems just under the premises.

DATED this 31st day of October, 2000.

SANDERS & PARKS, P.C.

By: /s/ Steven Plitt
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ORIGINAL and **ONE COPY**
filed with the Clerk this 31st day
of October, 2000

. . . and a **COPY** mailed to:

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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

CATT MICHELE HUTH, an Individual, Plaintiff, vs. HARTFORD INSURANCE COMPANY OF THE MIDWEST, an Indiana corporation, Defendant.	No. CV2000-020189 **COMPLAINT FOR DECLARATORY JUDGMENT RELIEF AND DEMAND FOR JURY TRIAL** (Other Civil-Declaratory Judgment)

Plaintiff Catt Michele Huth, an individual, alleges as follows:

I.

This action is brought pursuant to A.R.S. § 12-1831 *et. seq.*, the Arizona Uniform Declaratory Judgments Act, and demand for jury trial is hereby made.

II.

Defendant Hartford Insurance Company of the Midwest is an Indiana corporation with its principal place of business in the State of Indiana.

III.

Plaintiff Cat Michele Huth is a resident of the county of Maricopa, State of Arizona.

IV.

This Court has jurisdiction over the parties and subject matter of this litigation because this action for declaratory judgment pertains to whether there is coverage under an insurance policy issued under the laws of the State of Arizona by Defendant relative to Plaintiff, a resident of Maricopa County, who is an insured under the policy in question, relative to a Maricopa County, Arizona, motor vehicle accident.

V.

Hartford issued an insurance policy for Mary Sommers and Gail Huth bearing policy number 55 PAE461320. The Hartford policy provided insurance coverage subject to applicable conditions and limitations.

VI.

On or about November 27, 1999 Plaintiff Catt Michele Huth was involved in a motor vehicle accident at the intersection of 83rd Avenue and Olive Avenue, in the city of Peoria, Maricopa County, State of Arizona. As a result of the motor vehicle accident, Plaintiff Catt Michele Huth sustained bodily injury for which she has made a claim upon Hartford for underinsured motorist coverage benefits under the Hartford policy (Policy No. 55 PAE461320) issued to Gail Huth. Plaintiff Catt Michele Huth was then a resident of her mother's (Gail Huth's) household, and, therefore, is a qualified insured for underinsured motorist coverage under the Hartford policy (Policy No. 55 PAE461320).

VII.

Plaintiff Catt Michele Huth was a resident of Gail Huth's household at the time of the accident and, therefore, does qualify for underinsured motorist coverage benefits under Hartford's policy (Policy No. 55 PAE461320).

VIII.

Plaintiff Catt Michele Huth is entitled to a judgment against Defendant Hartford declaring that she is covered for underinsured coverage under the Hartford policy for the automobile accident which occurred on November 27, 1999 and the resulting injuries.

IX.

A justiciable controversy exists as to whether or not Hartford's policy provides underinsured motorist coverage benefits for Plaintiff Catt Michele Huth who does hereby request this Court to exercise its jurisdiction under A.R.S. § 12-1831, *et seq.*, the Arizona Uniform Declaratory Judgments Act to adjudicate and declare the rights and obligations of the parties under the Hartford policy.

X.

This action arises out of contract, entitling Plaintiff Catt Michele Huth to an award of reasonable attorney's fees pursuant to A.R.S. § 12-341.01.

XI.

Plaintiff Catt Michele Huth does hereby demand that this matter be resolved by jury trial.

WHEREFORE, Plaintiff Catt Michele Huth prays for judgment against Defendant Hartford adjudicating and declaring:

(1) That the underinsured coverage under Defendant Hartford's policy extends to and covers Plaintiff Catt Michele Huth (Policy No. 55 PAE461320);

(2) For attorney's fees incurred herein pursuant to A.R.S. § 12-341.01;

(3) For an award of costs incurred herein; and

(4) For such other and further relief as this Court deems just under the premises.

DATED November 8th, 2000.

GAGE & MATHERS, LTD.

By /s/ G. David Gage

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Catt Michele Huth

Supreme Court U.S.
FILED
JAN 27 2003
OFFICE OF THE CLERK

No. 02-0988

(2)

In The
Supreme Court of the United States

HARTFORD INSURANCE COMPANY OF THE MIDWEST, an Indiana corporation,

Petitioner,

vs.

CATT MICHELE HUTH, an individual,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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10 pp

QUESTIONS PRESENTED FOR REVIEW

1. Has this Court determined that a discretionary abstention-based remand is not governed by 28 U.S.C. §1447(c), as such a remand is not based on lack of subject matter jurisdiction or defects in removal procedure, per *Quackenbush v. Allstate Insurance Company*, 517 U.S. 706 (1996)?

2. Does Hartford erroneously contend that only 28 U.S.C. §1447(c) can support the remand, relying upon *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), not understanding that *Quackenbush* qualified *Thermtron* insofar as discretionary abstention-based remands are concerned?

3. Has Hartford abandoned its claim that the District Court abused its discretion in denying discretionary federal jurisdiction in this pure insurance declaratory judgment action (involving only state law issues) under the Federal Declaratory Judgment Act (FDJA), in accordance with the discretionary jurisdiction factors declared by this Court in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) and in *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942)?

4. Is there a conflict among the circuits regarding the pertinent issues of law?

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Wilton v. Seven Falls Co., 515 U.S. 277 (1995) ..... i, 3, 4, 5

STATUTES:

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28 U.S.C. §2201(a) 2

REASONS FOR DENYING THE WRIT

Inexplicably, Hartford's petition for certiorari abandons any claim that the District Court abused its discretion in applying the *Brillhart* factors – and in deciding **not** to exercise **discretionary** federal jurisdiction in this pure Federal Declaratory Judgment Act (FDJA) case. This represents a complete about-face for Hartford. *See* the Opinion (App.1-7) and Order (App. 8-14).

Hartford's Petition for Certiorari now only claims, in essence, that a federal court has **no discretion** to deny discretionary federal jurisdiction in any FDJA case in which the plaintiff's state court declaratory action has been removed, claiming that the removed state court case cannot be remanded.

To state such a position is to foreshadow its summary rejection. No case so holds. This Court ruled to the contrary in *Quackenbush*:

> " * * * . We have thus held that in cases where the relief being sought is equitable in nature or otherwise discretionary, federal courts not only have the power to stay the action based on abstention principles, but can also, in otherwise appropriate circumstances, decline to exercise jurisdiction altogether by either dismissing the suit or **remanding it to state court**. * * * .

Quackenbush, 517 U.S. at 721, emphasis supplied, and:

> " * * * . Under our precedents, federal courts have the power to dismiss **or remand** cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary. * * * ."

Quackenbush, 517 U.S. at 731, emphasis supplied.

Hartford cites *Thermtron* (Petition, p. 5) as the primary authority for its *Quackenbush*-rejected position, apparently unaware that *Quackenbush* (517 U.S. at 711-712) cites *Thermtron* in declaring that an "**abstention-based remand order** does not fall into either category of remand order described in §1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure" (emphasis supplied).

Such discretionary abstention is extended to FDJA cases, *Quackenbush*, 517 U.S. at 718-719, citing *Wilton*.

There is absolutely nothing in the text of the FDJA, 28 U.S.C. §2201(a) which restricts the discretionary exercise of discretionary FDJA jurisdiction in the manner advocated by Hartford:

> "(a) In a case of actual controversy within its jurisdiction * * * any court of the United States, upon the filing of an appropriate pleading, **may** declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. * * * ."

28 U.S.C. §2201(a), emphasis supplied.

"May" is the operative word which provides the basis for the unbroken line of cases which leave to the discretion of the district judge the discretionary decision to exercise or not exercise discretionary FDJA jurisdiction, subject to review for abuse of discretion.

See also the underlying *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800 (9th Cir. 2002) Opinion (reproduced in Petition for Certiorari, App. 1-7), which provides the following analysis (App. 3 and 6-7):

> "*Section* 2201 *Jurisdiction*
>
> "The exercise of jurisdiction under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a), is committed to the sound discretion of the federal district courts. *See, e.g., Wilton v. Seven Falls Co.*, 515 U.S. 277, 282-83 (1995); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494-95 (1942); *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998) (en banc). Even if the district court has subject matter jurisdiction, it is not required to exercise its authority to hear the case. *See Dizol*, 133 F.3d at 1223.
>
> * * *
>
> " * * * . Hartford argues the district court erred because no 'exceptional circumstances' justify abstention. 'Exceptional circumstances,' however, is not the standard for discretionary jurisdiction under 28 U.S.C. § 2001. *Wilton*, 515 U.S. at 286-88 (distinguishing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810-20 (1976)). * * * ."

Huth v. Hartford (reproduced in Petition for Certiorari, App. 3 and 6-7).

See also the District Court's underlying discretionary analysis of the *Brillhart* factors in its Order (reproduced in Petition for Certiorari, App. 8-14), including these observations (App. 12-13):

> "3 Hartford asks the court to place great weight on the fact that Huth filed her state court action after notice of Hartford's federal suit. The court notes that timing is legally insignificant given *Wilton*, in which the court upheld staying a federal action in favor of the state action which was filed one month later. 515 U.S. at 280.
>
> [and]
>
> "4 Hartford argues there is no state court action as it has been removed to federal court. The Court does not find this argument persuasive. Clearly CIV-00-2345 began in state court. Once this court decides to remand the action the case will proceed in state court rather than federal court. Hartford can not avoid the Court's jurisdictional discretion under the FDJA by removing a state court action and then arguing no state court action exists."

ORDER, U.S. District Court (in Petition for Certiorari, App. 12-13).

Given the foregoing, some overall comments are now directed to the Hartford's Petition's stated contentions and authority:

1. Regarding pages 5-7 of the Petition, it affirmatively appears that Hartford's basic premise (erroneously based upon *Thermtron*) is that there can be no discretionary abstention remand. This Court held to the contrary in *Quackenbush*, which is dispositive. The remand in this pure declaratory judgment action was well within the discretion of the District Judge.

2. Regarding the claimed conflict among the circuits (pages 8-13 of the Petition), there is no conflict. Not one of

the cited cases shares the factual and legal-discretionary attributes of this action.

3. Hartford is under the mistaken impression that a discretionary abstention remand is not possible; however, *Quackenbush* holds to the contrary (unknown to Hartford).

4. Then, thinking that the removed state court case somehow disappears forever, once removed, Hartford goes down the irrelevant semantic path regarding whether removal means that there is no concurrent or pending or parallel state court proceeding.

5. The simple answer is that *Quackenbush* held that the district court may order a discretionary abstention remand relative to, among other types of abstention, *Wilton* FDJA abstention. The District Court so ordered, in this case.

CONCLUSION

It was well within the discretion of the District Judge to decline discretionary FDJA jurisdiction, to stay Hartford's FDJA case and to remand Huth's Arizona declaratory action. Hartford has now conceded that there was no abuse of discretion by failing to urge abuse of discretion as an issue in its Petition for Certiorari. The Petition for Certiorari should be summarily denied.

Respectfully submitted,

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No. 02-988

In The
Supreme Court of the United States

HARTFORD INSURANCE COMPANY OF THE MIDWEST, an Indiana corporation,

Petitioner,

vs.

CATT MICHELE HUTH, an individual,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent Huth's opposition brief essentially ignores petitioner Hartford's issues. Respondent instead pretends that Hartford is raising some entirely different issue, and then suggests helpfully that the Court has already resolved it.

Petitioner is not arguing, as respondent wrongly claims, that "a federal court has no discretion to deny discretionary federal jurisdiction in any FDJA case in which the plaintiff's state court declaratory action has been removed." (Opp. at 1). Instead, Hartford expressly asked the Court to address the *extent* of discretion a federal district court has to abstain where, as here, there is no pending concurrent state court action. *See* Pet. at i, 13-14.

The Court in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), left this exact question unresolved:

> We do not attempt at this time to delineate the outer boundaries of that discretion [to abstain in declaratory judgment actions] in other cases, for example, cases raising issues of federal law *or cases in which there are no parallel state proceedings.*

515 U.S. at 290 (emphasis added). Respondent never addresses this issue left open in *Wilton,* and respondent never explains why the Court should decline to address it now.

Nor, as respondent also claims, did Hartford ignore *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996). To the contrary, petitioner cited *Quackenbush*, expressly noting that "a federal court has more discretion

to abstain when the action before it is based on the Federal Declaratory Judgment Act." (Pet. at 10). There is no question that a federal district court may not only abstain, but *remand,* when abstention is otherwise proper.[1] But respondent forgets two things. First, the action the district court here purported to remand was not a federal declaratory judgment action, but was instead a *state* action, filed under the Arizona Declaratory Judgments Act, over which the court admittedly had removal jurisdiction. *See Kirkbride v. Continental Cas. Co.,* 933 F.2d 729, 733-34 (9th Cir. 1991) (rejecting attempt to rely on broad discretion to decline to hear *federal* declaratory actions where case at issue was instead a removed *state* declaratory action).[2]

---

[1] In *Quackenbush* itself, for example, there was a concurrent pending state court action that might have helped support a remand on abstention grounds, had the Court not otherwise found that a remand there was improper. *See* 517 U.S. at 709, 731.

[2] Unlike the Federal Declaratory Judgment Act, the Arizona Act does not grant courts wide discretion to refuse to entertain declaratory judgment cases. *See* A.R.S. § 12-1831 (Pet. at 2). The Arizona Act instead confers the broad power to "declare rights, status and other legal relations whether or not further relief is or would be claimed," *id.*, and limits that jurisdiction only with the following narrow exception:

> The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

A.R.S. § 12-1386. The Arizona Supreme Court has confirmed the narrow discretion a court has to decline to exercise jurisdiction under this Act. *See Pena v. Fullinwider*, 601 P.2d 1326, 1329 (Ariz. 1979) (reversing trial court's refusal to grant relief under the Arizona Declaratory Judgments Act, and stating: "The refusal to grant declaratory relief is limited to cases where a declaration of rights would be *unnecessary or improper* at the time under all the circumstances.") (emphasis added).

Second, at the time the district court purported to remand the state action on abstention grounds, there *was* no parallel state court proceeding. Thus, even if jurisdiction had been wholly discretionary under the removed state court action, the remand here still raises the exact question left open in *Wilton*: was an abstention-based remand proper where there was no pending state court action?

It is no answer to argue, as respondent does, that the removed case below was a pending state court action. As noted in the petition, courts have recognized that a *removed* action is no longer a pending state court case that can be used to support abstention. *See generally* Pet. at 8-9, 11-12; *Myles Lumber Co. v. CNA Fire Corp.*, 233 F.3d 821, 824-25 (4th Cir. 2000); *Kirkbride v. Continental Cas. Co.*, 933 F.2d at 734. These same courts have refused to allow an abstention-based remand of the removed case, because they concluded that abstention was improper where there was no pending state court action. *Id.* The fact that other courts, including the Ninth Circuit below, have reached the opposite conclusion, and have *allowed* such remands (*see* Pet. at 13), simply highlights the need for the Court to now intercede and answer the question it left open in *Wilton* by delineating the boundaries of a district court's discretion to abstain where no pending state action exists.

Respondent argues simplistically that, because the Court noted in passing in *Quackenbush* that a federal court could abstain "or remand" where abstention is otherwise proper, the issue now raised has already been decided. But no one disputes that abstention-based remand may at times be proper. The question is whether it is proper *here*, where there is no concurrent pending state court action, and where the district court had admittedly

valid *removal* jurisdiction over a *state* declaratory judgment action.

The petition for certiorari should be granted.

Respectfully submitted,

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